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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1994

Mary J. Rossman
Petitioner,

vs.

Commissioner, Internal Revenue Service
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A TAXPAYER WHO HAS NOT FILED A TAX RETURN IS BARRED BY THE STATUTE OF LIMITATIONS FROM OBTAINING A REFUND OF OVERPAID TAXES TWO YEARS AFTER THE TAXES WERE PAID.

II. WHETHER AN OVERPAYMENT OF TAXES PROPERLY DETERMINED BY THE TAX COURT IS REFUNDABLE TO A TAXPAYER WHO DID NOT FILE A TAX RETURN, WHERE THE NOTICE OF DEFICIENCY IS MAILED MORE THAN TWO YEARS BUT LESS THAN THREE YEARS AFTER THE DATE THE SUBJECT TAX RETURN WAS DUE TO BE FILED, AND THE TAXES ARE DEEMED TO HAVE BEEN PAID.

LIST OF PARTIES

The parties to the instant proceedings are Mary J. Rossman, petitioner, and the Commissioner of Internal Revenue, respondent. The parties at the United States Tax Court for this action were:

Mary Rossman v. Commissioner of Internal Revenue, T.C.M. 1993-351

Petitioner:	Mary J. Rossman
Respondent:	Commissioner of Internal Revenue

There are no other known parties in interest.

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2. Congress originally intended that taxpayers would have three years from the due date of a tax return to file a refund claim. This intention was not changed when section 6511(a) was amended in 1958. 14

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mary J. Rossman prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on January 27, 1995. (Appendix A).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1a) is not reported.

The proceeding in the United States Tax Court (App. B, *infra*, 3a) is reported at T.C.M. 1993-351.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1a) was filed January 27, 1995. This Court has jurisdiction to review the judgement and opinion of the Court of Appeals pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The pertinent portions of the statutory provisions relevant to resolution of this case are as follows:

Title 26 U.S.C. (Internal Revenue Code) section 6511:

> (a) PERIOD OF LIMITATION ON FILING CLAIM. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *
>
> (b) LIMIT ON AMOUNT OF CREDIT OR REFUND. -
>
> * * * * *
>
> (2) limit on amount of credit or refund. -
>
> (A) LIMIT WHERE CLAIM FILED WITHIN 3-YEAR PERIOD. - If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding

the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

(B) LIMIT WHERE CLAIM NOT FILED WITHIN 3-YEAR PERIOD. - If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

Title 26 U.S.C. (Internal Revenue Code) section 6512(b):

(b) OVERPAYMENT DETERMINED BY TAX COURT. -

(1) JURISDICTION TO DETERMINE. - Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year * * *, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

* * * * *

(3) LIMIT ON AMOUNT OF CREDIT OR REFUND.--No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid --

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c) or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) Within the period which would be applicable under section 6511(b)(2), (c) or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency -

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

STATEMENT OF THE CASE

This dispute involves the 1988 individual income tax liability of Petitioner, Mary J. Rossman ("Rossman"). The due date of Rossman's 1988 tax return was properly extended to October 16, 1989, however she did not file her tax return by that date. The amount of $16,829.44 was withheld from Rossman's wages during 1988.

On May 7, 1991 (at which time Rossman had still not filed her 1988 tax return), the IRS mailed a notice of deficiency to Rossman for the taxable year 1988, in which the IRS determined that there was a deficiency in Rossman's income tax for the taxable year 1988, and that Rossman was liable for additions to tax pursuant to IRC sections 6651(a) and 6653(a)(1). On July 14, 1991, Rossman filed a Federal income tax return for the year 1988 with the IRS Service Center at Fresno, California. On August 7, 1991, Rossman filed a timely petition in the tax court for redetermination of her 1988 tax liability.

The tax court found there was no deficiency in Rossman's tax liability for 1988 and that Rossman had actually overpaid her 1988 taxes by $5,871.44. [1] Notwithstanding that Rossman had overpaid her taxes, the tax court denied her a refund, on the ground that claim for refund was barred by the statute of limitations at the time the IRS issued its notice of deficiency, May 7, 1991.

NINTH CIRCUIT RULING: Rossman filed timely appeal to the Court of Appeals for the Ninth Circuit, which affirmed the tax court, although on a different ground than relied on by the tax court. The circuit court applied the law of that circuit, as announced in *Miller v. United States*, 38 F.3d 473, 475 (9th. Cir. 1994), and held that Rossman's claim was barred because she did not file her tax return within two years after the date the taxes were paid.

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[1] The tax court also found that Rossman was not liable for additions to tax for the taxable year 1987 under the provisions of 26 U.S.C. §§ 6651(a) or 6653(a)(1). This finding has no bearing on this case.

REASON FOR GRANTING THE WRIT

THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS PRESENTS AN IMPORTANT UNRESOLVED QUESTION CONCERNING THE TAX COURT'S AUTHORITY TO ORDER REFUNDS OF OVERPAID INCOME TAXES, AND THE STATUTE OF LIMITATIONS APPLICABLE TO CLAIMS FOR REFUND OF OVERPAID TAXES.

The Circuit Courts are divided with respect to whether an overpayment properly determined by the tax court is refundable to a taxpayer who did not file a tax return, in the limited circumstance where the notice of deficiency is mailed more than two years but less than three years after the date the subject tax return was due to be filed. [2]

The Second, Sixth, Seventh, Ninth and Tenth Circuits have all held that an overpayment is barred in these circumstances. *Davison v. Commissioner*, 9 F.3d 1538 (Table), unpublished, (2d Cir. 1993); *Allen v. Commissioner*, 23 F.3d 406 (Table), unpublished, (6th Cir. 1994), aff'g 99 T.C. 475 (1992); *Galuska v. Commissioner*, 5 F.3d 195, 93-2 U.S.T.C. ¶50,537 (7th Cir. 1993); *Rossman v. Commissioner*, unpublished, (9th Cir. 1995) (the instant case); and *Richards v. Commissioner*, 37 F.3d 587, 94-2 U.S.T.C. ¶50,542 (10th Cir. 1994). These decisions conflict with the decision of the Fourth Circuit in *Lundy v. IRS*,

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[2] If the notice of deficiency was mailed less than two years after the return due date, an overpayment is refundable whether the applicable "refund period" is two years, per section 6511(b)(2)(B), or three years, per section 6511(b)(2)(A). Further, if the notice of deficiency was mailed more than three years after the return due date, the overpayment is not refundable, because the maximum three year refund period will have been exceeded.

45 F.3d 856, 95-1 U.S.T.C. ¶50,085 (4th Cir. 1995), which holds that overpayment *is not* barred.

The Ninth Circuit denies the overpayment on the rationale that a taxpayer who has not filed a return within two years of the date the taxes were paid is *absolutely barred* from obtaining a refund, even if a return is subsequently filed within three years of the due date. *Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994). In *Rossman*, the Ninth Circuit applied the *Miller* rule and found that because Rossman had not filed a return within two years after the taxes were paid, she was barred from obtaining a refund of her overpaid taxes.

The Second, Sixth, Seventh, and Tenth Circuits reach the same result, but employ a different analysis. Those courts reason that under section 6512(b)(3)(B), the taxpayer is deemed to have filed a claim for refund on the date the IRS issued the notice of deficiency. Applying this reasoning, they hold that if a tax return has not been filed, *and the notice of deficiency was issued more than two years but less than three years after the return was due*, the "deemed claim" was not filed "within 3 years from the time the return was filed," *i.e.*, because it was deemed filed before a return was filed, section 6511(a), with the result that the two year refund period of section 6511(b)(2)(B) applies. Under this rationale, the taxpayer is denied a refund, because the taxes were paid more than two years before the deemed claim date.

The Ninth Circuit's rule, barring refunds to any taxpayer who has not filed a return within two years after payment, *Miller*, 38 F.3d at 475, conflicts directly with the decision of the Fourth Circuit in *Lundy v. IRS*, 45 F 3d 856. The *Lundy* court specifically rejected the Ninth Circuit's rationale:

> We agree that the Millers should have had the same period of time to file a claim for refund in the Tax Court that they had in the district court. However, we believe that they had three years from the payment of taxes to file their claim for

refund. *We disagree with the Ninth Circuit's interpretation of both section 6511(a) and section 6512(b)(3)(B).*

Lundy, 45 F.3d at 868 (Emphasis added).

The Ninth Circuit's rule also conflicts with the Seventh and Tenth Circuits, which have held that a return filed within three years of the due date constitutes a timely claim for refund, within the meaning of section 6511(a). In *Galuska, t*he Seventh Circuit stated:

> Galuska could have filed a return on April 12, 1990 [more than two years but less that three years late] *that would have served as a proper claim for refund*, but unfortunately he filed no return until September 19, 1991 [more than three years late].

Galuska, 5 F.3d at 197 (Emphasis added). [3] In *Richards*, a 1987 return was filed January 23, 1991, within three years of the due date. Although the Tenth Circuit denied a refund, on the "deemed claim" rationale discussed above, the court stated with respect to the three-year rule of section 6511:

> If Ms. Richards' claim had been brought in federal district court, we would have agreed with her position that the three-year refund period applied under § 6511(b)(2)(A) and the taxes she overpaid would have been refundable.

Richards, 37 F.3d at 591. The three-year refund period under section 6511(b)(2)(A) can apply *only* if the claim is filed within three years after the return is filed. Thus, the Tenth Circuit agrees that a return/claim filed in the 2-to-3 year gap is a timely refund claim.

Finally, the Ninth Circuit rule also conflicts with the official position of the United States. In Rev. Rul. 76-511, 1976-2 C.B.

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[3] See also *Curry v. United States*, 774 F.2d 852, 85-2 U.S.T.C. ¶9743 (7th Cir. 1985) (return filed within three years of due date would be timely refund claim). Accord, *Risman v. Commissioner*, 100 T.C. 191, 199, 203-04 (1993) (1981 return filed June 7, 1989 is timely claim within meaning of three-year rule of section 6511(a)).

428, the Internal Revenue Service ruled that an original tax return first filed more than two but less than three years after the due date constitutes a timely claim for refund. This continues to be the position of the United States. In response to the taxpayer's petition for rehearing in *Miller*, the government stated:

> As indicated earlier, we do not dispute taxpayers' contention that the filing of a valid return, even if untimely, generally triggers application of the three-year limitations period for filing a claim for refund under I.R.C. § 6511(a), irrespective of the timeliness of the return. That view is also consistent with the stated position of the Internal Revenue Service, as expressed by Rev. Rul. 76-511, 1976-2 C.B. 428.

Appellee's Response to the Appellants' Petition for Rehearing En Banc, p. 8. Notwithstanding, the Ninth Circuit denied the Millers' petition for rehearing, and declined to modify its opinion with respect to the two-year rule of section 6511(a), as suggested by the United States.

The writ should be granted to resolve the conflict among the circuit courts of appeal.

ARGUMENT

The court of appeals incorrectly held that Rossman's claim for refund was barred on the date the IRS issued a notice of deficiency because she did not file a tax return within two years after the subject taxes were paid. The court of appeals should have held that Rossman was entitled to a refund of her overpaid taxes because she actually filed a return (which also constituted a claim for refund) within three years of the date her return was due to be filed.

1. Section 6511(a) provides three distinct rules, each of which applies to a specified class of taxes. The rule in section 6511(a) that provides "if no return was filed

> by the taxpayer, [a claim must be filed] within 2 years from the time the tax was paid" *does not apply to taxes for which a return is required*. This rule does not apply to the taxes in this case.

The circuit court held that its decision herein was dictated by its prior decision in *Miller*, 38 F.3d 473. In *Miller*, Ninth Circuit relied on the "if no return was filed" clause of section 6511(a) to support its holding -- that because no return had been filed as of two years after the date of payment of the taxes, any claim was untimely. *Miller* is incorrect, however, because the "if no return was filed" clause *does not apply to taxes for which a return was required*.

Section 6511(a) contains limitations rules for three distinct types of taxes. The first rule applies to taxes "in respect of which the taxpayer is required to file a return," and is the rule applicable in this case. [4] The second rule, *i.e.*, the "if no return was filed" clause, does not state explicitly to which taxes it applies, but we shall demonstrate that it *does not apply* to the taxes at issue in this case. The third applies to taxes "paid by means of a stamp;" this rule also does not apply in this case.

Section 6511(a) begins:

> Claim for credit or refund of an overpayment of *any tax imposed by this title in respect of which tax the taxpayer is required to file a return* shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from

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[4] In general, a return is required if gross income exceeds the sum of the personal exemptions to which the taxpayer is entitled and the standard deduction. Section 6012(a). For 1988, the standard deduction for single persons was $3,000, section 63(c)(2)(C)(as in effect for 1988), and the personal exemption was $1,950. Section 161(d)(as in effect for 1988). A return for a single person was required for 1988 if gross income exceeded $4,950. Rossman's gross income for 1988 far exceeds the minimum above which a return was required.

the time the tax was paid, whichever of such periods expires the later * * *

Section 6511(a) (Emphasis added). This is the rule for *all taxes* for which a tax return is required; filing a return is neither necessary nor relevant to its operation.

The clause in section 6511(a) that provides: "or if no return was filed by the taxpayer, within 2 years from the time the tax was paid" refers only to taxes for which the taxpayer was *not required to file a return*. Section 6511 applies to all taxes under the Code, rather than the general six-year limitations period for civil claims against the government. See *J.O. Johnson, Inc. v. United States*, 476 F.2d 1337, 1340-41 (Ct. Cl.), *cert. denied*, 414 U.S. 857 (1973); Treas. Regs., 26 C.F.R. section 301.6511(a)-1. Because the first clause applies to taxes for which a return is required, this clause applies to what is left, *i.e.*, taxes for which a return *is not* required. One such example is the penalty pursuant to section 6672 (the so-called Trust Fund Recovery Penalty, formerly called the 100% penalty). See *Kuznitsky v. United States*, 17 F.3d 1029, 93-2 U.S.T.C. ¶50,491 (7th Cir. 1994); *US Life Title Insurance Co. v. United States*, 784 F.2d 1238, 1243 n.6, 86-1 U.S.T.C. ¶9278 (5th Cir. 1986) ("Since no returns are filed in the case of section 6672 liabilities, only the two-year rule has significance here."). Other examples are transferee liability under section 6901, see *Ancel v. United States*, 398 F.2d 456, 457, 68-2 U.S.T.C. ¶9470 (7th Cir. 1968), and the tax on prohibited transactions under section 4975.

Any other interpretation of this clause renders the words "in respect of which the taxpayer is required to file a return" superfluous and without any meaning. Further, if the "no return required" clause applies to taxes for which a return is required, it is redundant, because there is no situation to which it can apply that is not already provided for by the previous clause, as discussed above. To give effect to all of the words used by the Congress, this provision must be recognized to be limited in its application only to those taxes for which a return *is not required*,

even though that is not explicitly stated. See *Mountain States Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

The history of section 6511(a) further supports the non-applicability of the "no return filed" clause to taxes with respect to which a return is required. As originally enacted, [5] the relevant portion of section 6511(a) read as follows:

> (a) PERIOD OF LIMITATION ON FILING CLAIM. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer *within 3 years from the time the return was required to be filed* (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

Internal Revenue Code of 1954, section 6511(a) (Emphasis added). In this original version of section 6511(a), taxpayers who were required to file a return were *always* permitted a full three years from the date their returns were due within which to make a refund claim. Whether a return was filed was irrelevant, because the measuring date for the three year rule was the *return due date*, not the filing date. Under this original provision, a taxpayer who filed a claim for refund (even if that claim was not also a return) [6] between 2 - 3 years after the taxes were paid, i.e., more than two but less than three years after the due date in the case of withheld taxes, would be entitled to a refund. Thus, for "return required taxes," the original rule applied *in all cases*:

- If the claim was filed within three years of the due date, it was timely, and per section 6511(b)(2)(A) the taxpayer

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[5] Ch. 736, 68A Stat. 808.

[6] At the time section 6511(a) was amended, claims could be filed either on a tax return or on Form 843. See footnote 15, *infra*.

could obtain a refund of all taxes paid in the preceding three years.

- If the claim was filed more than three years after the due date, section 6511(b)(2)(B) limited the refund to amounts paid in the preceding two years.

Because this rule covered all possible circumstances, no additional rule was needed for return required taxes. This further illustrates that the rule for "no return required taxes," was not meant to apply to taxes for which a return was required. Where a return was not required, obviously it would not be filed, and Congress provided, *in a separate rule*, that the claim must be filed within two years after payment. In those cases, section 6511(b)-(2)(B) operated to limit the refund to amounts paid within the two year period before the claim was filed. [7]

Any other construction leads to an irreconcilable conflict between these two clauses. If a return was required but not filed, the first clause would have permitted a claim for a full three years, whereas the second clause would bar it after two years. This statutory clash is avoided by recognizing that the "no return required" rule simply does not apply if a return is required.

Rossman was required to file a return. [8] The Ninth Circuit, in applying *Miller*, 38 F.3d 473, to dictate the outcome herein,

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[7] We note that refund claim cases always present two questions. The first question is whether a timely claim has been filed. This is governed by section 6511(a). If the claim is not timely under those rules, no refund is allowed. Section 6511(b)(1). If, and only if, a claim has been timely filed, the second question is how much may be refunded. This is where the section 6511(b)(2) limits come into play. An example will illustrate: Assume a return is required but not filed, taxes are overpaid by withholding, and the taxpayer makes an additional payment 2 years after the return due date. If a return/claim is filed 3 1/2 years after it was due, it is timely under section 6511(a), because it was filed within three years of the time the return was filed. However, the amount refundable is limited because the three year look-back period will only reach the second payment.

[8] See footnote 4, *supra*.

relied on the "no return filed" clause of section 6511(a), to conclude that any claim for refund of income tax is untimely unless a tax return has been filed. The decision of the Ninth Circuit is incorrect, because that clause has no application where, as here, a return was required to be filed.

2. Congress originally intended that taxpayers would have three years from the due date of a tax return to file a refund claim. This intention was not changed when section 6511(a) was amended in 1958.

Congress intended that taxpayers who have not filed timely tax returns would have a three year period (plus extensions of time for filing) within which to file (delinquent) returns and claim refund of their taxes that were overpaid through wage withholding and timely estimated tax prepayments. As noted *supra*, p. 12, when the Internal Revenue Code of 1954 was first enacted, section 6511(a) provided that refund claims were required to be filed within three years of the date the return was due. There was no requirement to file a tax return; all the statute required was that the claim be filed within three years of the return due date. Under this original statutory scheme, Rossman would have been entitled to refund of her overpaid taxes, because she filed her claim (which also constituted her return) on July 14, 1991, which date is within three years of the October 16, 1989 due date of her 1988 tax return. [9] Furthermore, under section 6512(b)(3)(B), the tax court would have been ordered that her overpaid taxes be refunded, because, under any construction of that section, a claim filed on the date the notice of deficiency was issued would have been effective to warrant that refund.

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[9] It is also within three years of the *original* due date of Rossman's return, April 15, 1989.

Section 6511(a) was amended to its present form in 1958. [10] The exclusive purpose of the amendment to section 6511(a) was to *extend* the limitations period within which late filers could file refund claims. [11] To achieve this purpose, Congress changed the measuring date for determining timeliness of refund claims from three years *after the due date* to three years *after the date the return was filed*. Where a return was filed after the due date, the statute of limitations on *assessment* was measured from the date the return was actually filed. Section 6501(a). In such a case, the refund statute would expire three years from the return due date, whereas the assessment statute would not expire until three years after the return was actually filed. The amendment brought the limitations period for a late return into conformity with the three years available to the government for additional tax assessments, by making the actual filing date the measuring event. Thus, Congress meant to allow *additional time* for filing refund claims in cases where returns had not been filed on time.

There is no indication in the legislative history of this amendment, and there is no other evidence, that Congress intended to shorten the time for any taxpayer to file a refund claim, to make any change in the *tax court's* authority to determine refundability of overpaid taxes, or otherwise to cause any change in the operation of section 6512(b)(3)(B). In fact, section 6512 is not even mentioned in the legislative history. The circuit court's decision *shortens* the time within which the taxpayer who has not filed a return must file a refund claim. Congress did not intended

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[10] Technical Amendments Act of 1958, Pub. L. 85-866, sec. 82(a), 72 Stat. 1663. S. Rept. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1019-1020, 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 854-855, 912; *See*, *Allen*, 99 T.C. at 480-81.

[11] In this regard, it is noteworthy that before the amendment both periods were in conformity *with respect to the first three years after the return due date*. Contrary to Congress' intent, the circuit court's decision creates non-conformity where there was conformity before.

to single out this limited class of taxpayers for a special, shorter, statute of limitations for claiming refunds.

Section 6511(a) already provided a three year period for filing refund claims, *even for taxpayers who had not filed returns*. The context of the 1958 amendment clarifies that it was only intended to affect delinquent tax returns, and Congress' intention was to lengthen the limitations period, not shorten it. There is simply no case in which the limitations period under either the original or the amended statutory language of section 6511(a) can be less than three years from the due date of the return. See *Lundy*, Slip op. at 2-3. Interpreting this section in a manner that shortens the time within which refund claims are required to be filed is contrary to Congress' intent.

In reaching its decision in *Miller*, upon which its decision herein was based, the circuit court failed to examine section 6511(a) as it was originally enacted. As a result, the court overlooked what Congress really intended to be the time taxpayers have to file refund claims. However, as the *Lundy* court demonstrated, the amended language does not reflect Congress' intention that "[t]he two-year period, however, does not cut short the three-year window of opportunity that taxpayers have to collect refunds on their withheld tax; it only extends the three-year window in cases where the taxpayer paid additional tax after the due date of tax returns." *Lundy*, 45 F.3d at 859.

CONCLUSION

The decision of the Ninth Circuit, based on *Miller*, conflicts directly with the decision of the Fourth Circuit in *Lundy*, and the two cases are factually indistinguishable. The decision of the Ninth Circuit also conflicts with decisions of the Seventh and Tenth Circuits, because those circuits hold that returns filed more than two years after the return due date can constitute timely refund claims under section 6511(a).

The Ninth Circuit's ruling is also inconsistent with the official position of the United States, as published in Rev. Rul. 76-511.

The Petitioner submits that her Petition for a Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit should be granted to resolve this conflict.

Respectfully Submitted,

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Counsel for Petitioner

April ___, 1995

(Appendices follow)

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY J. ROSSMAN, Petitioner-Appellant, v. COMMISSIONER, INTERNAL REVENUE SERVICE, Respondent-Appellee.	CA No. 93-70886 Tax Ct. No. 17599-91 M E M O R A N D U M*

Appeal from a Decision of the
United States Tax Court

Argued and Submitted January 13, 1995
Pasadena, California

BEFORE: CANBY and NOONAN, Circuit Judges, and KING, ** District Judge

The parties are familiar with the facts of the case; we will not recite them here. We affirm the decision of the Tax Court.

Our recent decision in Miller v. United States, 38 F.3d 473 (9th Cir. 1994), controls the result here. Miller dictates that where "no return had been filed as of two years after the date of payment of the taxes, any claim was untimely" under 26 U.S.C. § 6511(a). Miller, 38 F.3d at 475. Section 6513(b)(1) deems all

of Rossman's tax payments for 1988 to be made on April 15, 1989. Because Rossman did not file her return until July of 1991, more than two years after she paid the taxes in question, her claim is untimely. See id.

We therefore affirm the judgment of the Tax Court even though it was reached by different means. See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 874 (9th Cir. 1987) ("We may affirm the [trial] court on any ground supported by the record, even if the ground is not relied on by the [trial] court.").

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX B

T.C. Memo 1993-351

UNITED STATES TAX COURT

MARY J. ROSSMAN, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 17599-91 Filed August 11, 1993.

David M. Kirsch, for petitioner.

Deirdre A. James, for respondent.

MEMORANDUM OPINION

Hamblen, Chief Judge: By statutory notice of deficiency dated May 7, 1991, respondent determined a deficiency in petitioner's 1988 Federal income tax and additions to tax as follows:

	Additions to tax	
Deficiency	Sec. 6653(a)(1)	Sec. 6651(a)
$17,755	$887.75	$231.50

Unless otherwise indicated, section references are to the Internal Revenue Code in effect for the taxable year at issue, and Rule references are to the Tax Court Rules of Practice and Procedure.

After concessions, [1] the sole issue for decision is whether petitioner is entitled to a determination from this Court that petitioner has an overpayment of her 1988 Federal individual

[1] Respondent has conceded that petitioner is not liable for additions to tax under secs. 6651(a) and 6653(a)(1).

income tax, or whether the statutory time limitations of sections 6511 and 6512 proscribe such a determination.

Background

This case was submitted fully stipulated under Rule 122. The stipulation and attached exhibits are incorporated by this reference. Petitioner resided in Los Altos Hills, California, at the time the petition was filed in this case.

On or before April 15, 1989, petitioner filed an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (Form 4868) for the taxable year 1988. On or before August 15, 1989, petitioner also filed an Application for Additional Extension of Time to File U.S. Individual Income Tax Return (Form 2688) for the taxable year 1988. Accordingly, the date by which petitioner was required to file her 1988 income tax return was extended to October 16, 1989. Petitioner did not file her income tax return on or before that date.

On May 7, 1991, respondent issued a notice of deficiency to petitioner relating to her 1988 income tax liability. As of May 7, 1991, petitioner still had not filed an income tax return or a claim for refund for 1988. However, on July 14, 1991, petitioner filed her 1988 income tax return with the Internal Revenue Service Center in Fresno, California. Petitioner filed her petition with this Court on August 7, 1991.

The parties now agree that petitioner's total income tax liability for 1988 is $10,958. As a result of Federal income tax withholding from her wages, petitioner paid a total of $16,829.44 for the 1988 taxable year. Accordingly, there was an overpayment of petitioner's 1988 Federal income taxes in the amount of $5,871.44.

Petitioner contends that she is entitled to a determination of an overpayment of her 1988 Federal income tax, and that the overpayment should be refunded to her. Respondent contends that petitioner is not entitled to a determination of an overpayment because of the time limitations of sections 6511 and 6512.

We agree with respondent.

Discussion

Under section 6512(b)(1), this Court has jurisdiction to determine the existence and amount of any overpayment of tax to be credited or refunded to a taxpayer. [2] *Patronik-Holder v. Commissioner*, 100 T.C. __, __ (1993) (slip op. at 6-7); *Allen v. Commissioner*, 99 T.C. 475, 476-477 (1992); *Galuska v. Commissioner*, 98 T.C. 661, 664 (1992); *Berry v. Commissioner*, 97 T.C. 339, 342 (1991). However, section 6512(b)(3) limits the amount of allowable credit or refund based on the time of payment of the portion of tax to be credited or refunded.

Section 6512(b)(3) provides that no credit or refund shall be allowed unless this Court determines that the portion was paid by the taxpayer at or during one of the three time periods specified in subparagraphs (A), (B), and (C). Section 6512(b)(3)(B), the applicable provision in this case, provides:

> (3) Limit on amount of credit or refund.--No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid--
>
> * * *
>
> (B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not

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[2] Sec. 6512(b)(1) provides in relevant part:

> (1) Jurisdiction to determine.--Except as provided by paragraph (3) * * *, if the Tax Court finds that there is * * * a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

filed) stating the grounds upon which the Tax Court finds that there is an overpayment * * * [Emphasis added.]

Pursuant to this provision, a taxpayer is deemed to have filed a claim for credit or refund on the date the notice of deficiency was mailed. *Patronik-Holder v. Commissioner*, supra at __ (slip op. at 9); *Allen v. Commissioner*, supra at 477; *Berry v. Commissioner*, supra at 345. Refund or credit may be made or allowed of any amounts that could have been refunded or credited under section 6511(b)(2), (c), or (d) with respect to such deemed claim. Neither party claims that subsections (c) and (d) of section 6511 are applicable here. Thus, we focus on section 6511(b)(2).

Section 6511(b)(2) contains three subparagraphs, each providing what is commonly referred to as a "look-back" rule. [3] If subparagraph (A) of section 6511(b)(2) applies, then the credit or refund shall not exceed the amount of tax paid during the period, immediately preceding the filing of the (deemed) claim, equal to 3 years plus the amount of extension of time for filing the return (hereinafter sometimes referred to as the 3-year look-back period). If, on the other hand, subparagraph (B) applies, then the refund or credit shall not exceed the amount of tax paid during the 2-year

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[3] Sec. 6511(b)(2) provides in relevant part:

(2) Limit on amount of credit or refund.--

(A) Limit where claim filed within 3-year period.--If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

(B) Limit where claim not filed within 3-year period.--If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

period immediately preceding the filing of the (deemed) claim (hereinafter sometimes referred to as the 2-year look-back period).

The dispute between the parties centers on which subparagraph, (A) or (B), of section 6511(b)(2) applies to petitioner's claim for refund. [4] Pursuant to section 6512(b)(3)(B), petitioner's claim is deemed to have been filed on May 7, 1991, the date that the notice of deficiency was mailed to her. Pursuant to section 6513(b)(1), petitioner is deemed to have paid the taxes her employer withheld from her salary during 1988 on April 15, 1989. Thus, petitioner's 1988 taxes were paid more than 2 but less than 3 years prior to the deemed filing of the claim for refund. Accordingly, if the 3-year look-back period of subparagraph (A) of section 6511(b)(2) applies, petitioner is entitled to a refund of her overpayment of tax for 1988, while if the 2-year look-back period of subparagraph (B) applies, the refund of the overpayment is barred.

This Court has consistently held that where, as in the present case, the taxpayer failed to file a tax return prior to the date that the notice of deficiency was mailed, the 2-year look-back period of subparagraph (B) of section 6511(b)(2), rather than the 3-year look-back period of subparagraph (A) of that section, is applicable. *Patronik-Holder v. Commissioner*, supra; *Allen v. Commissioner*, supra; *Galuska v. Commissioner*, supra; *Berry v. Commissioner*, supra. This is so regardless of whether a claim for credit or refund is filed subsequent to the date the notice of deficiency is mailed. See *Allen v. Commissioner*, supra at 479; *Berry v. Commissioner*, supra at 344.

The 3-year look-back period applies only if the claim was filed during the "3-year period prescribed in [section 6511(a)]." Sec. 6511(b)(2)(A). [5] Section 6511(a) provides that the claim for

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[4] Neither of the parties suggests that subpar. (C) of sec. 6511(b)(2) is applicable here.

[5] In *Allen v. Commissioner*, 99 T.C. 475, 478-479 n.5 (1992), we

(continued...)

credit or refund "shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." (Emphasis added.) In Allen, we reasoned that--

> This use of the imperative "shall be filed", in conjunction with the use of the past tense "was filed" in relation to the return, indicates that in order for the 3-year period of limitations to apply, the return must be filed at or before the time at which the claim for credit or refund is filed or deemed to be filed. * * * [*Allen v. Commissioner*, 99 T.C. at 479.]

Since at the time the claim is deemed to have been filed (the date the notice of deficiency was mailed) petitioner had not yet filed a 1988 tax return, the 3-year period prescribed in section 6511(a) does not apply. Consequently, the 3-year look-back period provided for in subparagraph (A) of section 6511(b)(2) does not apply in this case. Instead, the 2-year look-back period of section 6511(b)(2)(B) applies.

Under section 6512(b)(3)(B), petitioner is deemed to have filed a claim for credit or refund on May 7, 1991, the date the notice of deficiency was mailed. Accordingly, under the 2-year look-back rule of section 6511(b)(2)(B), petitioner is entitled to recover only that portion of the tax paid on or after May 7, 1989. Because section 6513(b)(1) deems the tax withheld from petitioner's wages during 1988 to have been paid on April 15, 1989, no portion of the tax was paid during the 2-year look-back period. Therefore, we hold that petitioner is not entitled to a determination that she has an overpayment of her 1988 income tax.

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[5](...continued)
noted that "There is potential confusion because two different 3-year periods are referred to in sec. 6511(b)(2)(A). One is based on the 3-year period for filing a claim for refund in sec. 6511(a), measured from the time a return was in fact filed, and the other limiting the amount refundable to the amount paid during the 3-year look-back period immediately preceding the filing of the claim."

Petitioner contends that our deemed claim analysis is not supported by the statute and that, instead, the proper test is whether the taxpayer could have filed a valid tax return and claim for refund on the date the notice of deficiency was mailed. [6] We disagree. The language "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed)", contained in section 6512(b)(3)(B), specifically directs this Court, for the purpose of applying section 6511(b)(2), to assume that a claim had been filed--a deemed claim concept. *Lundy v. Commissioner,* T.C. Memo. 1993-278. It instructs us to apply section 6511(b)(2) to a specific hypothetical situation--the filing of a claim on the date the notice of deficiency was mailed. It does not authorize us to determine what would have happened had a tax return been filed on the date the notice of deficiency was mailed. [7]

Petitioner further contends that the deemed claim provided for in section 6512(b)(3)(B) should also constitute a deemed return. Again, we disagree with petitioner. Although one document could serve both functions--be a tax return and also be a claim for credit or refund--it does not follow that "tax return" and "claim for credit or refund" are interchangeable terms. Lundy v. Commissioner, supra. Section 6511(a) contains the term "return" three

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[6] Under this proposed (but incorrect) standard, petitioner would be entitled to a refund. If, absent the mailing of a notice of deficiency, petitioner had filed a tax return on May 7, 1991, reporting the overpayment, the return would have constituted a timely claim for refund, and the 3-year look-back period of sec. 6511(b)(2)(A) would have applied. See *Risman v. Commissioner*, 100 T.C. __ (1993).

[7] Petitioner's erroneous interpretation of the statutory standard might be due, in part, to her misquotation of the applicable statutory language. On at least two occasions petitioner's brief misquotes the language of sec. 6512(b)(3)(B). The brief, purportedly quoting the statute, states that sec. 6512(b)(3)(B) authorizes this Court to determine a refund provided that a timely and effective claim "could have been filed" under sec. 6511(b)(2). (Emphasis added.) The phrase "could have been filed" does not appear in sec. 6512(b)(3)(B). Instead, sec. 6512(b)(3)(B) provides for the application of sec. 6511(b)(2) as if a claim "had been filed". (Emphasis added.)

times and the phrase "Claim for credit or refund" twice in close juxtaposition. From this, we conclude that the Congress understood that there was a difference between a tax return and a claim for credit or refund. Section 6512(b)(3)(B), the application of which depends in part on section 6511(a), refers to a claim for credit or refund and does not refer to a tax return. Accordingly, we conclude that section 6512(b)(3)(B) embodies a deemed-claim, but not a deemed-return, concept. Lundy v. Commissioner, supra.

Petitioner also contends that the omission of any explicit reference to a notice of deficiency in section 6511 indicates that whether or not a notice of deficiency has been issued is irrelevant to the application of section 6511(b)(2), and is therefore irrelevant to the determination of whether the 2-year look-back period or the 3-year look-back period applies. Again we disagree. This contention ignores the interrelationship between sections 6511 and 6512(b)(3)(B). We arrive at section 6511(b)(2) because we have been instructed to go there by section 6512(b)(3)(B). The instruction in section 6512(b)(3)(B) explicitly directs us to apply section 6511(b)(2) on a specified date--the date of the mailing of the notice of deficiency.

Petitioner's final contention is that the denial of relief by this Court will create an unreasonable disparity between those taxpayers in petitioner's situation who choose to pursue their claims in the Tax Court and those who utilize a District Court or the Court of Federal Claims. In support of this contention, petitioner alleges that, if she had paid the asserted deficiency and then sued for a refund in the District Court or the Court of Federal Claims, either of those courts would have had jurisdiction to refund her overpayment.

We do not view this potential disparity as affecting our decision. Other differences exist between the application of the statutes of limitations to Tax Court proceedings and the application to refund proceedings in other courts. *Lundy v. Commissioner*, supra (discussing examples of these differences). Therefore, the fact that a potential disparity exists between forums is

not a sufficient reason to depart from the plain meaning of the statutory language.

Petitioner contends that a recent decision by the Court of Appeals for the Eleventh Circuit, *Bokum v. Commissioner,* 992 F.2d 1136 (11th Cir. 1993), affg. T.C. Memo. 1990-21, provides authority for her "unreasonable disparity" argument. [8] Although the opinion in that case contains some language that could support petitioner's position, we find that case to be distinguishable from the present case.

The Court of Appeals in *Bokum* ruled that this Court has jurisdiction to determine an equitable estoppel claim raised by a taxpayer in a case properly brought before this Court. [9] Unlike the equitable estoppel jurisdictional issue raised in *Bokum*, for which no specific statutory provision applied, the issue in the present case is explicitly governed by section 6512(b)(3)(B). The *Bokum* decision recognized the distinction between situations where this Court's authority to decide an issue is governed by a specific statute and those where it is not, stating that "the Tax Court has no equitable power to expand its statutorily prescribed jurisdiction." *Bokum v. Commissioner*, supra at 1140 (citing *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987)). Under this reasoning, we are required to follow the explicit statutory limitations of section 6512(b)(3)(B).

Although the result in the present case may seem harsh, had petitioner timely filed her 1988 tax return, as she is required to do by law, she would have been entitled to a credit or refund. "The unhappy result for petitioner is the consequence of a 'problem of

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[8] We note that the present case is appealable to the Court of Appeals for the Ninth Circuit, and *Bokum v. Commissioner,* 992 F.2d 1136 (11th Cir. 1993), affg. [Dec. 46,323(M)], T.C. Memo. 1990-21, is therefore not controlling. *Golsen v. Commissioner,* 445 F.2d 985 (10th Cir. 1971), affg. [Dec. 30,049], 54 T.C. 742 (1970).

[9] The Court of Appeals in Bokum although finding in the taxpayers' favor on the jurisdictional issue, ruled against the taxpayers on the merits of their equitable estoppel claim.

* * * [her] own creation' ". *Allen v. Commissioner,* 99 T.C. 475, 480 (1992) (quoting *Berry v. Commissioner,* 97 T.C. 339, 345 (1991)). The statute is intricate and precise, and we must apply it as the Congress enacted it.

To reflect the foregoing,

Decision will be entered under Rule 155.